Supreme Court, U.S.
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No. 01-477

In the

Supreme Court of the United States

FOSTER F. BURGESS,

Petitioner,

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

On Petition for Writ of Certiorari to the Florida District Court of Appeal, First District

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a property owner who establishes that he has been denied all economically viable use of his land is also required to prove that such denial "interfered with his reasonable, distinct, *investment-backed expectations*, held at the time he purchased the property."

2. Whether the remaining permissible uses of regulated property are *economically viable* when they consist solely of "personal recreational use[s]," i.e., "nature walks and fishing."

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REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner Foster F. Burgess respectfully files this reply to respondent's Brief in Opposition (Opp.).

ARGUMENT

Mr. Burgess presented two questions of federal takings law. He respectfully suggested that the petition be granted, the judgment below vacated, and the case remanded for reconsideration in light of *Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001). Without even addressing the propriety of a GVR, respondent asserts that the first question is not properly before the Court and that the conflict underlying the second question does not exist. As set forth below, both assertions are wrong.

I

CONTRARY TO RESPONDENT'S ASSERTION, THE FIRST QUESTION PRESENTED IS PROPERLY BEFORE THIS COURT

Respondent asserts that the first question presented by the petition—"Whether a property owner who establishes that he has been denied all economically viable use of his land is also required to prove that such denial 'interfered with his reasonable, distinct, *investment-backed expectations*, held at the time he purchased the property' "—was "not squarely presented in the present case." Opp. at 4. This assertion is preposterous. As set forth in the petition, the court below squarely held that in order to establish a regulatory taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), a property owner not only must demonstrate that he was deprived of all economically viable use of his land; he "*also* [is] required to demonstrate that the [deprivation] interfered with his reasonable, distinct, investment-backed expectations." Petition Appendix (Pet. App.) at C–6 (emphasis added) (citing *Good v.*

United States, 189 F.3d 1355, 1360-61 (Fed. Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000); *Loveladies Harbor v. United States*, 28 F.3d 1171 (Fed. Cir. 1994)). *See* Petition at 4.

Perhaps recognizing this point, respondent suggests that because the issue of investment-backed expectations was not the "principal issue on appeal," and because the Florida court ruled against Mr. Burgess on another ground, the above-quoted ruling on a question of federal constitutional law was therefore "unnecessary dictum," such that this Court "would merely be issuing an advisory opinion" if it were to grant relief. Opp. at 5. This reasoning is absurd. As is apparent, the state court rejected Mr. Burgess' federal takings claim for *two* reasons, both based on that court's *mis*understanding of federal takings law. *See* Pet. App. at C–5 to –6; Petition at 4-5. Under respondent's tortured logic, *both* rulings are insulated from review by this Court because, as to each ruling, one could say that the *other* ruling was an "independent . . . ground" for the decision. Opp. at 5. Indeed, under such logic, this Court would be precluded from reviewing *any case* in which a "title, right, privilege, or immunity is specially set up or claimed under the Constitution [of] . . . the United States," 28 U.S.C. § 1257(a), but is rejected on more than one *federal-law* ground.

Not only is this proposition self-evidently wrong, it cannot be reconciled with the Court's ruling in *Palazzolo v. Rhode Island*, the decision in light of which Mr. Burgess seeks a remand of the present case. As this Court described the procedural posture of the litigation, "the State Supreme Court recited *multiple* grounds for rejecting petitioner's . . . takings claim." 121 S. Ct. at 2457 (emphasis added). But because all of those grounds were based in federal law, and because the petitioner in that case challenged all of those grounds in his petition, the Court faced no barrier, jurisdictional or prudential, to granting review and resolving the federal questions. The same is true here. Contrary to respondent's insinuation, *see* Opp. at 5 (referring to the "independent state ground" doctrine), both of the

two reasons proffered for rejecting Mr. Burgess' takings claim —retention of economically viable use and lack of investment-backed expectations—were based in federal law. *See* Pet. App. at C–3 to –6 (extensively discussing *Lucas* and numerous federal cases interpreting that decision). Just like Mr. Palazzolo, Mr. Burgess has challenged each of those "multiple" federal-law rulings in his two questions presented. Accordingly, the first question presented is properly before this Court.

II

THE LOWER COURT'S HOLDING THAT PERSONAL RECREATIONAL USES OF REGULATED PROPERTY ARE PER SE ECONOMICALLY VIABLE DOES INDEED PRESENT A CONFLICT

In the present case (as in *Lucas*), the trial court found that the government's action deprived the property of all economically viable use. As observed by the court below, Mr. Burgess invited the court to affirm that finding "by reading *Lucas* as a rejection of recreational use as an economically beneficial use." Pet. App. at C–5. The court rejected that invitation, saying that petitioner's "argument fails." *Id.* Or, as the court also put it: Mr. Burgess "claim[s] that recreational use is not an economically beneficial use, and we reject the claim." *Id.*

As every respondent is wont to do, respondent here calls this ruling "fact-specific" and "fact-based." Opp. at 6 n.2, 7. Mr. Burgess submits rather that the lower court essentially held that "personal recreational use[s]," i.e., "nature walks and fishing," Pet. App. at C–4, are per se economically viable uses of property. But to the extent this holding is anything less than categorical, to the extent it is indeed "fact-specific," that is due entirely to the lower court's injection of "expectations" into the issue of economic viability. Thus, the court's conclusion that Mr. Burgess retains economically viable use of his land notwithstanding he is restricted to "personal recreational use" of it

rested in part on the fact that Mr. Burgess "bought the property for recreational use and has thus used it in the previous decades" and also that "the property remains eminently suitable for the use for which he bought it and to which he has put it these many years." *Id.* at C–5. That is, the court found it significant that he "bought the land as an undefined 'investment,' with no specific (or even general) *expectation* of developing or improving the property." *Id.* at C–6 (emphasis added).

But precisely to the extent the lower court made its holding more "fact-specific" by inquiring into Mr. Burgess' unique "expectations" to resolve his *Lucas*-type claim, the lower court issued a decision that is in conflict with *Palazzolo* and with the decisions of the Court of Appeals for the Federal Circuit. *See* Petition at 6-8. As set forth in Part I of the petition, that conflict warrants a GVR in light of *Palazzolo*, consistent with the Court's action in *McQueen v. South Carolina Department of Health & Environmental Control*, 121 S. Ct. 2581 (2001). *See* Petition at 9.

Respondent also asserts that the two state-court decisions cited by the petition as standing in conflict with the decision of the Florida court below "rest on their own specific facts." Opp. at 7. Doubtless that shibboleth is as true of those cases as any other, but it is nonetheless undeniable that the decision below could not have issued from the courts of either South Carolina or Maryland. In *McQueen v. South Carolina Coastal Council*, the court held that Mr. McQueen "suffered a textbook taking" under *Lucas*, because "[t]he only use of the land available to [him] after the permit denials . . . was '*recreational, aesthetic use*.' " 496 S.E.2d 643, 650 (S.C. Ct. App. 1998) (emphasis added), *aff'd in relevant part*, 530 S.E.2d 628, 631 (S.C. 2000). Respondent would distinguish *McQueen* on the ground that the court's "finding of no viable economic use was based on testimony that Mr. McQueen could do *nothing* with his lots." Opp. at 7. To be more accurate, the court stated that Mr. "McQueen testified that he is unable to do anything with either lot." 496

S.E.2d at 650. That necessarily meant anything *economically viable*, for it was undisputed that (just like Mr. Burgess here), Mr. McQueen could "crab or fish on his lots." *Id.* In conflict with the Florida court, however, the South Carolina court held that such personal recreational use "does not truly"—meaning economically—"benefit McQueen," so that he had "suffered a textbook taking." *Id.*

Respondent also attempts to downplay the conflict with *Steel v. Cape Corp.*, 677 A.2d 634 (Md. Ct. Spec. App. 1996). To be sure, the property in *Steel* was "across the street from a shopping center," while Mr. Burgess' property "is in a remote wetlands area." Opp. at 8, 9. Also, *Steel* involved "residential property," while the present case involves property that is, in a broad sense, "recreational." *Id.* But these distinctions hardly make the cases "dramatically different," Opp. at 9, when one focuses on the essentials: the very same "personal recreational use[s]" that made Mr. Burgess' property economically viable in the eyes of the court below were available to the owners of the property in *Steel*. *See* 677 A.2d at 649 (observing that the permissible uses under the challenged zoning included "general recreational uses that preserve the natural environment," along with "temporary structures for boating, swimming, fishing, hunting," and other recreational pursuits). Yet despite the availability of these personal recreational uses (and more), the Maryland court held that "the uses permitted in [such zoning] districts do not include any viable economic uses" as that term is used in *Lucas*. *Id.*[*] Accordingly, the conflict is real.

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[*] Respondent devotes several paragraphs to justifying "[t]he state court's consideration of the property's appreciation in value." Opp. at 10. That would be a fascinating issue—*if* the state court had in fact given it any consideration. But the court actually did not base its rejection of Mr. Burgess' takings claim on the value of his property, appreciated or otherwise, and respondent tellingly provides no citation to the opinion below on this point.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the petition, the petition for writ of certiorari should be granted.

DATED: November, 2001.

Respectfully submitted,

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